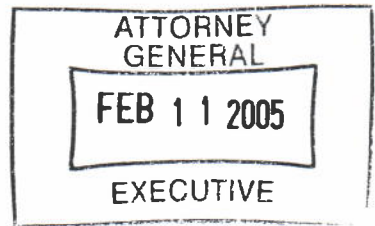


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BRIAN K. HARRIS  
*of Counsel*

FEB 11 2005

February 1, 2005

Shelley Exeter  
Attorney General  
State Capitol Complex, East Bldg, Suite 320  
Salt Lake City, Utah 84114

RE: Notice of Claim

Dear Ms. Exeter:

RECEIVED

FEB 18 2005  
WATER RIGHTS  
SALT LAKE

My office represents the Ott family regarding a dispute which has arisen concerning their property located in or around Tropic, Utah. My clients have already filed suit against the Tropic and East Fork Irrigation Company (hereinafter Tropic) and the Otter Creek Irrigation Company (hereinafter Otter Creek). After Tropic answered my clients' Complaint for damages, we have become aware that the events leading up to my clients' injuries were known, acquiesced, and approved by the Utah State Engineer's Office, Water Commissioner. Up until this point in time, my clients believed that the two entities named in the Complaint were the only parties liable for the injuries they sustained. With this new knowledge gained from Tropic, NOTICE OF CLAIM IS HEREBY GIVEN.

FACTS:

The Otts are the legal owners, equitable owners or otherwise claim an interest in certain property located in the area of Tropic, Garfield County, State of Utah, lying within Section 21, 22, and 28 of Township 36S Range 4W. The East Fork of the Sevier River runs through the Ott Property. Being a part of the Sevier River Basin, the East Fork of the Sevier River flowing through the Ott property is subject to the Cox Decree adjudicating the Sevier River System. The Cox Decree provides that the point of diversion for the Tropic and East Fork Irrigation Company is to be diverted from the East Fork of the Sevier River at the southwest corner of the southeast quarter of southeast quarter of Sec. 21, T. 36 S., R. 4 W., into the Tropic Canal. With period of use April 1<sup>st</sup> to June 1<sup>st</sup> - 20.00 c.f.s. With period of use June 1<sup>st</sup> to October 15<sup>th</sup> - 15.00 c.f.s. Also a storage right of 540 ac. ft. for a Reservoir located in Section 4 and 5, T. 37 S. R. 4 W., from May 1<sup>st</sup> to October 15<sup>th</sup>.

Irrespective to the clear mandate of the Cox Decree, Tropic and East Fork continued to locate its diversion at S 402 ft E 1143 ft from N4 cor., Sec. 28, T. 36 S., R. 4 W., into the Tropic canal.

Instead of moving the point of Diversion to conform with the Cox Decree, Tropic and East Fork continued its non-conforming diversion until its unlawful diversion was discovered by the Otts who gave notice to Tropic.

On April 12, 2004, instead of conforming its Point of Diversion to the Cox Decree, Tropic filed for a change in its point of diversion (change application number 61-2173 (a28860)) with the Utah Division of Water Rights. An informal administrative hearing was held on July 28, 2004, in the Panguitch City Council room. At the hearing, Tropic argued that the location of the Point of Diversion, at least since 1892, has been in the same location which it is now and the requested change was amending the Cox Decree to formally describe the correct point of diversion. Utah Division of Water Rights found that the historic records as well as the common knowledge of the physical location by water users in the area for many decades supports the applicant's position that the water right record simply contains an error that this change application will correct. The Utah Division of Water Rights approved change application number 61-2173 (a28860) subject to prior rights and with the following conditions:

- 1) The amount of water diverted by the applicant from the East Fork of the Sevier River is limited to 20.0 c.f.s. from April 15<sup>th</sup> to June 1<sup>st</sup> and to 15 c.f.s. from June 2<sup>nd</sup> to October 1<sup>st</sup> for the irrigation of 1,435.6 acres.

- 2) Permanent diversion structures, head gates and measuring devices shall be installed to accurately distribute waters diverted under this change and shall be available for inspection by the State Engineer or his representatives.

- 3) The approval was limited to the rights to divert and use water and does not grant any rights of access to nor use of land or facilities not owned by the applicant.

Utah Code Annotated 73-1-6 provides that irrigations companies shall have the power of eminent domain to establish a right of way for the use and maintenance of the waterway running through the Otts' property. However, Utah Code Annotated 73-1-6 requires the water companies to pay just compensation for such right-of-way. Furthermore, in exercising this power of eminent domain, the water companies are required to act reasonably so as not to injure the Otts' property. The Cox Decree describes Tropic's storage right in the Tropic Reservoir as 540 Acre Feet for the period May 1 to October 15. The proposed determination provides that the reservoir has a capacity of 180 acre feet with a right to fill three times yearly during the period from April 1 to September 1.

A later decree restricts Tropic's use of water to April 15 through October 14. Based on these documents storage outside the period of April 15 through October 15 is not authorized under any water right held by Tropic. However, on or about the 21<sup>st</sup> day of February, 1961, Tropic entered into a written agreement with Otter Creek wherein Tropic would store Otter Creek Water in the Tropic Reservoir and would receive compensation in the form of ten percent of the amount of water stored and that the River Commissioner would distribute the water according to the terms of the agreement until April 15, 1968, or until a change is asked for by either party. Otter Creek has not transferred any of its storage rights from Otter Creek Reservoir to Tropic Reservoir. Because water is not authorized for storage during the October 15 to April 15 period, Tropic's storage during this period is unauthorized and in violation of the Cox and other Decrees and in violation of § 73-3-29 Utah Code Ann.

Tropic, in order to supply water to Otter Creek pursuant to the Agreement has repeatedly stored water from October 15 to April 15 of each year and released the stored water out of the Tropic Reservoir at a rate that is above the natural carrying capacity of the natural channel part of which is located upon the Ott property. The Otts are informed and believe that in order to further Tropic's purposes in delivering water to Otter Creek, irrigation companies have exploded dynamite on the banks of the East Fork running along the Ott property to destroy beaver dams and the natural habit of said bank diminishing the value of the Otts' property. The Otts believes that the release of the illegally stored water was intentionally designed to "flush" the natural waterway to provide more water to be delivered to Otter Creek than would occur naturally. Such actions by the irrigation companies, individually and in concert, eroded and depleted the waterway bank causing a considerable loss to the Otts' top soil from off their property, eroded the stream banks, destroyed the natural animal habitat, destroyed the natural fishery in the stream and drained the natural meadow conditions abutting the stream. The Otts have incurred and will incur damages to remediate the loss of topsoil, destruction of animal habitat, stream bank erosion, loss of fishery and loss of meadowland abutting the stream.

As more particularly set forth above, Tropic and Otter Creek store water in the Tropic Reservoir to be used for irrigation purposes. Periodically, Tropic causes or permits the control gates of the Tropic dam to be opened to send irrigation water to Otter Creek pursuant to their Agreement. Such release and flooding is done intentionally and is released in an amount above the natural carrying capacity of the natural channel in order to get more water to Otter Creek. Such release and flooding of water exceeds any express or implied easements, if any there be, lying within the streambed owned by the Tropic or Otter Creek and constitutes a trespass onto the Otts' property. Such release and flooding constitutes a continual trespass in derogation of the Otts' rights in the property. This continuing trespass has damaged the Otts by causing the loss of topsoil, destruction of animal habitat, stream bank erosion, loss of fishery and loss of meadowland abutting the stream of the East Fork. The Otts' damage is a continuing damage as a result of this continual trespass which the Otts believes may well exceed \$1,000,000.00 to fully remediate and restore.

In 1962, Wallace Ott and Mary Ott granted to Tropic the right to erect and maintain a cement canal on the existing right-of-way of Tropic as to property lying within Sections 21 and 22 in Township 36, Range 4W according to the laws of the State of Utah. The then existing right-of-way encompasses eight feet in width and three (3) feet in depth and extends for a distance of eight (8) miles through the Otts' land, among others. The irrigation companies and each of them have no right or interest in any portion of the Ott property beyond that contained in the easement.

The scope of said easement is for the use and maintenance of a concrete ditch and does not include installation of culverts and pipelines within the easement nor any of the Ott property lying outside the easement. The Otts had granted Tropic a license and permission to place a large culvert in the channel just above the diversion existing on the Otts' property at issue.

On November 16, 2004, the Otts revoked all licenses to use the Otts' property heretofore given to Tropic. Said licenses had been previously given to Tropic to permit Tropic to use and maintain the East Fork of the Sevier River running through Section 28 of the Ott Property. Such permissive use

of the land granted to the irrigation companies had run since the Ott Family took possession of the property in the 1960's until effectively revoked on November 16, 2004. Any easement existing when the Otts took title and possession of the property was limited to the historic course and flow of the East Fork of the Sevier River being not more than eight feet in width and three feet deep except as may have been interrupted by naturally occurring beaver dams running along the entire length of the Ott Property. No enlargement of the existing easement has occurred except however the easement was expanded in scope by way of deed to allow for the placement of the cement canal within Section 21 and 22.

Any enlargement of the scope or land subject to the easement for and of Defendant's purposes was permissive and oral constituting a license until revoked on November 16, 2004. An actual dispute has arisen between the parties concerning the scope and nature of the easement and the license and the compensation which may be owed to the Otts by the irrigation companies for exceeding the scope of the easement. The Otts have entered into litigation requesting a judicial declaration concerning the rights and obligations of the parties.

As one undertaking to store water in an unnatural state, Defendant Tropic and East Fork is strictly liable for any damage resulting from such storage and use. The Otts' have been damaged as a direct and proximate result of Tropic's methods and use of the water, in that as a result of water releases to down stream water users, The Otts' have been damaged by the loss of valuable top soil, destruction of animal habitat, stream bank erosion, loss of fishery and loss of meadowland abutting the stream. The total damages resulting from defendant's actions are believed by the Otts to be well in excess of \$1,000,000.00 to fully remediate and restore the property, an amount to be determined at trial.

Defendant, Tropic owed a duty to act as a reasonable prudent person in the same or similar circumstances to all foreseeable parties that may be injured by the acts of the Defendant water company. The Otts' were foreseeable parties as their property lays downstream from the Defendant's reservoir. Tropic and Otter Creek breached that duty by entering into an illegal contract for storage of water and then unreasonably releasing and flooding the Otts' property. Such use of the water was known by, and directed by the Utah State Engineer's Office, Water Commissioner. Tropic, Otter Creek, and the water engineer, individually and collectively, were the cause in fact and proximate cause of the Otts' injuries and damages. As a result of the irrigation companies' negligence which was orchestrated with the water engineer, the Otts have been damaged by the loss of topsoil, destruction of animal habitat, stream bank erosion, loss of fishery and loss of meadowland abutting the stream of the East Fork in an amount believed by the Otts to be at least the amount of one million dollars to remediate and restore the property all to be determined at trial.

The irrigation companies and each of them have entered into an agreement for storage of water that is illegal as set forth above. The irrigation companies and each of them, because of their illegal agreement, have stored water without a storage right in the Tropic Reservoir and then released the stored water in amounts which exceed the natural carrying capacity of the stream thereby causing injury and damage to the Otts which will be continuing unless such storage and release of water is enjoined. There exists no legal remedy to protect the Otts and their property from the future damage



that will result if the wrongful parties are allowed to continue their wrongful acts. It is proper under these facts that a court grant the Otts an injunction preventing the parties from illegally storing water in the Tropic Reservoir and further enjoining them from releasing water from Tropic Reservoir at anytime to allow more than 20 c.f.s. of water to flow through the Otts' property. Furthermore, it should be ordered that Tropic, Otter Creek, and the Water Engineer be ordered to limit their use of the waterway and diversion structures and canal lying within the Otts' property so as not to infringe on the Otts' property rights extending beyond eight feet in width and three feet in depth. A court should forbid the wrongful parties and each of them and those in concert with them or under their control from discharging explosives on the Otts' property without the express written permission of the property owner. Finally, it is proper for a court to restrain any planned use of the waterway running through the Otts' property that not only exceeds the spacial specifications of the easement but also changes the scope of the easement which is that of a concrete ditch without the initiation of eminent domain proceedings and compensation for such taking.

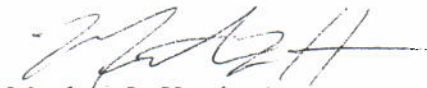
As stated above, Tropic, by answering the Otts' Complaint, have put the Otts on notice that the Utah State Water Commissioner over the waters at issue knew, approved, and directed the irrigation companies' illegal uses that have damaged the Otts. As such, the State of Utah should be held joint and severably liable for the damage that has been done to the Otts' property. They demand two million dollars to compensate them for their injuries.

It is may office's belief that the State of Utah is liable to the Otts under theories of trespass, strict liability, and negligence. The damages the Otts seek result from destruction of real property, loss of considerable topsoil, infringement on their real property ownership rights (such as the right to exclude and use and enjoy their property without unreasonable interference), among others.

In effort to resolve this matter, we hope to hear from you soon. If you have any questions, please contact me at the above referenced numbers.

Very truly yours,

HARRIS & HARRIS LAWYERS, LLC



Matthew L. Harris, Attorney

MLH/nb

encl: none

SUIT/CLAIM RECEIVED  
OFFICE OF THE ATTORNEY GENERAL

Received: 2/11/05 Forwarded to Stewart Hanson: 2/11/05  
Certified Mail X Regular Mail \_\_\_\_\_  
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CC Norm Johnson \_\_\_\_\_

CERTIFIED MAIL

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